IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 24070-3-III**
	)	
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
NORMAN CLARK MORRISON,	)	
	)	
Appellant.	)	**UNPUBLISHED OPINION**

KATO, J.—Norman Morrison was convicted of attempting to manufacture methamphetamine and possession of methamphetamine. Claiming the court erroneously denied his motion to suppress, he was unlawfully arrested, the prosecutor committed misconduct, and he was denied effective assistance of counsel, he appeals. He also contends the evidence was insufficient to support his conviction for attempting to manufacture methamphetamine. We affirm his conviction for attempted manufacture, but reverse his conviction for possession.

On January 14, 2005, Kittitas County Deputy Sheriff Dan Kivi received a call regarding suspicious vehicles on Teanaway River Road in the Teanaway Campground area. He stopped a car leaving the area and contacted the driver,

Amanda Opey. She had just dropped Mr. Morrison off at the campground.

Deputy Kivi proceeded to the campground and noticed a large sign stating the campground was closed. He entered the campground and saw a fifth wheel, travel trailer, and a black truck. He contacted Mr. Morrison, who said the fifth wheel was his, the truck was registered to his girlfriend, Kelly Ralston, and the travel trailer belonged to Allen Chapman. Mr. Morrison was living in his fifth wheel and was also responsible for the travel trailer.

Deputy Kivi told Mr. Morrison the campground was closed. He said he knew that, but he had permission to be there until the truck was fixed. He later said, however, that he had been told to leave the area a few days earlier.

Deputy Kivi was unable to find any identifying numbers on the travel trailer. He asked Mr. Morrison to go into the trailer to see if he could find any paperwork establishing ownership. The door to the trailer was open and he saw drug paraphernalia on a table. When Mr. Morrison came out, the deputy asked what the items on the table were. Mr. Morrison replied it looked like drug paraphernalia.

Corporal Sean Hillemann also responded and saw drug paraphernalia inside the travel trailer. He arrested Mr. Morrison for possession of drug paraphernalia and conducted a pat down search incident to arrest. He found a

small glass vial containing a powdery substance, seven AA lithium batteries wrapped in black electrical tape, and coffee filters.

The two officers also saw a number of propane tanks, plastic tubing, and an electrical generator around the campsite. One of the propane tanks had the top cut off and appeared to have been in a fire. It smelled like cat urine. Another had a stainless steel fitting. A third tank was found with a blue fitting and covered with a black garbage bag. The fitting suggested the tank had been used to store anhydrous ammonia. The police suspected a methamphetamine lab.

The State charged Mr. Morrison with manufacturing methamphetamine, unlawful storage of anhydrous ammonia, possession of methamphetamine, and possession of drug paraphernalia. The State later amended the information to add accomplice liability on the manufacturing methamphetamine charge.

Mr. Morrison filed a motion to suppress the evidence. He claimed the campsite was private property and the officers had no authority to conduct a search on the property without a warrant. The court denied the motion and issued oral findings of fact and conclusions of law. No written findings were entered.

At trial, Officer Koss of the Ellensburg Police Department testified he had contacted Mr. Morrison at a Rite Aid store in December 2004. Mr. Morrison was buying Sudafed cold tablets and told the officer he intended to give the tablets to

a third party so they could manufacture methamphetamine. He stated he would be given some of the methamphetamine in return.

A jury convicted Mr. Morrison of possession of methamphetamine and attempting to manufacture methamphetamine. This appeal follows.

Mr. Morrison first challenges the court's failure to enter findings of fact and conclusions of law under CrR 3.6(b). But this failure is harmless if the record of the court's oral decision is sufficient to permit appellate review. *State v. Radka*, 120 Wn. App. 43, 48, 83 P.3d 1038 (2004); *State v. Cunningham*, 116 Wn. App. 219, 226, 65 P.3d 325 (2003). The court's oral ruling here is sufficient.

Mr. Morrison next claims the deputy lacked probable cause to arrest him for possession of drug paraphernalia so the subsequently gathered evidence should have been suppressed. "Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed." *State v. Terrovona*, 105 Wn.2d 632, 643, 716 P.2d 295 (1986).

The police arrested Mr. Morrison for possession of drug paraphernalia. But mere possession of drug paraphernalia is not a crime and cannot be the basis for an arrest. *State v. McKenna*, 91 Wn. App. 554, 563, 958 P.2d 1017 (1998); *State*

v. Lowrimore, 67 Wn. App. 949, 959, 841 P.2d 779 (1992); *see also State v. O'Neill*, 148 Wn.2d 564, 584 n.8, 62 P.3d 489 (2003). Using the paraphernalia to ingest drugs is a misdemeanor. RCW 69.50.412. A police officer, however, cannot arrest for a misdemeanor unless the arrestee commits that crime in the officer's presence. RCW 10.31.100; *O'Neill*, 148 Wn.2d at 584 n.8.

The officers did not observe Mr. Morrison use the paraphernalia. *See* RCW 69.50.412; *O'Neill*, 148 Wn.2d at 584 n.8; *McKenna*, 91 Wn. App. at 563. The timing and location of the defendant, behavior of the defendant, and location of the paraphernalia are factors to consider when determining if a reasonable inference exists to suggest the paraphernalia was used. *See State v. Neeley*, 113 Wn. App. 100, 108, 52 P.3d 539 (2002). There is nothing in the record to indicate Mr. Morrison had used the paraphernalia. Probable cause to arrest him for use of drug paraphernalia did not exist. Because the arrest was not valid, the search of Mr. Morrison was illegal and the items found on his person should have been suppressed. *O'Neil*, 148 Wn.2d at 585.

Mr. Morrison further claims the seizure of the five gallon bucket was unlawful because it was not in open view. "Under the 'open view' doctrine, detection by an officer who is lawfully present at the vantage point and able to detect something by utilization of one or more of his senses does not constitute a

search within the meaning of the Fourth Amendment." *State v. Ross*, 141 Wn.2d 304, 313, 4 P.3d 130 (2000) (citing *State v. Seagull*, 95 Wn.2d 898, 901, 632 P.2d 44 (1981)). If the police have legitimate business, they may enter areas of the curtilage which are impliedly open, such as access routes to the house. *Id.*

Mr. Morrison concedes the officers were lawfully at the campsite. He nonetheless argues that because the bucket was under a tarpaulin, it was not in open view and thus not properly seized. He did not raise this argument at the suppression hearing. A newly raised argument will not be reviewed "where the facts necessary for its adjudication are not in the record and therefore where the error is not 'manifest.'" *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993). Because Mr. Morrison did not make this argument below, few details surrounding the discovery of the bucket were developed. Consequently, the record is insufficient to review the issue for the first time on appeal and the alleged error is not manifest.

Mr. Morrison argues the prosecutor committed misconduct during his closing argument. To prevail on a claim of prosecutorial misconduct, the defendant must establish the impropriety of the conduct and a substantial likelihood the misconduct affected the verdict. *State v. Brett,* 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert. denied,* 516 U.S. 1121 (1996). Reversal is not

required if the defendant did not request a curative instruction that would have obviated the error. *State v. Russell,* 125 Wn.2d 24, 85, 882 P.2d 747 (1994), *cert. denied,* 514 U.S. 1129 (1995).

Failure to object to an improper remark constitutes a waiver of the error unless the remark is so flagrant and ill intentioned that it resulted in prejudice which could not have been neutralized by an instruction. *Id.* at 86. Only if there is a substantial likelihood the misconduct affected the verdict must a conviction be reversed. *Id.*

Mr. Morrison first claims the prosecutor stated he was guilty of manufacturing methamphetamine because he brought anhydrous ammonia to the campsite. But that is not an accurate reflection of the State's argument. The prosecutor stated:

> So now I think what we do is we have got these elements and the way lawyers say let's give meaning to what these words mean, what does manufacture mean? And it specifically means production, preparation, propagation, compounding, converting, processing either directly or indirectly or packing or repacking a controlled substance. Preparing to manufacture methamphetamine is manufacturing methamphetamine. When you bring the ingredients to some place to manufacture methamphetamine you commit the crime of manufacturing methamphetamine. When he brought the anhydrous ammonia to the scene with the purpose of manufacturing methamphetamine, he committed the crime. It is that simple.

2 Report of Proceedings (April 6, 2005) at 180. The prosecutor argued the facts

presented at trial to the jury and explained how the facts established the legal elements of the crimes charged. This argument was permissible.

Mr. Morrison also claims it was error for the prosecutor to argue the purchase of Sudafed was sufficient to convict him of attempted manufacture. He bought Sudafed in December 2004 and admitted it was going to be used to manufacture methamphetamine. The prosecutor then argued that this act established he was attempting to manufacture methamphetamine. The argument was proper.

Mr. Morrison further contends he was denied effective assistance of counsel. To establish ineffective assistance, he must show his attorney's performance was deficient and he was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). The first element is met by showing that defense counsel's performance was not reasonably effective under prevailing professional norms. *Strickland*, 466 U.S. at 688. The second element is met by showing a reasonable probability that, but for counsel's errors, the result would have been different. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A strong presumption exists that counsel provided effective assistance. *Brett*, 126 Wn.2d at 198.

Mr. Morrison first claims defense counsel was ineffective for failing to object to testimony regarding his buying Sudafed for a methamphetamine manufacturer. He asserts the evidence would have been inadmissible under ER 404(b), in which evidence of a defendant's other crimes or bad acts is not admissible to prove his character as a ground for suggesting that his conduct on a particular occasion was in conformity with it. But such evidence may be admissible to show "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). In order to determine the admissibility of any evidence under ER 404(b), the court must (1) identify the purpose for which the evidence is offered; (2) determine if the evidence is relevant to prove an essential element of the crime; (3) balance the probative value of the evidence against the prejudicial effect; and (4) determine that the bad acts occurred by a preponderance of the evidence. *State v. Lough*, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). Because there was no objection, the court did not make this determination.

The evidence of this earlier participation in the manufacture of methamphetamine was relevant to show Mr. Morrison's knowledge of the manufacturing process and his plan or preparation of the scheme to manufacture. *See State v. Hepton*, 113 Wn. App. 673, 688, 54 P.3d 233 (2002), *review denied*,

149 Wn.2d 1018 (2003). This is a proper basis for admission under ER 404(b).

The evidence was highly relevant to the manufacturing charge. The unfair prejudice was minimal. The prejudicial effect of the evidence did not outweigh its probative value. Accordingly, counsel was not ineffective for failing to object.

Mr. Morrison also asserts counsel should have objected to this evidence because his statements were made without *Miranda*[1] warnings. The *Miranda* safeguards apply "as soon as a suspect's freedom of action is curtailed to a 'degree associated with formal arrest.'" *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984) (quoting *California v. Beheler*, 463 U.S. 1121, 1125, 103 S. Ct. 3517, 77 L. Ed. 2d 1275 (1983)). Whether a defendant was in custody for *Miranda* purposes depends on "whether the suspect reasonably supposed his freedom of action was curtailed." *State v. Short*, 113 Wn.2d 35, 41, 775 P.2d 458 (1989). Nothing suggests Mr. Morrison was in custody during his conversation with Officer Koss at the Rite Aid store. In these circumstances, the failure to object does not show ineffective assistance.

Mr. Morrison further contends his counsel should have objected to the prosecutor's questioning him about this incident during cross examination. He claims the questions were beyond the scope of direct. ER 611(b) states that

---

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

"[c]ross examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness." The rule, however, gives the trial court the discretion to permit inquiry into additional matters. Mr. Morrison was not asked about the Rite Aid incident on direct examination, so an objection that the question was beyond the scope of direct examination may have been proper. But it is also likely the trial court would have allowed the question because it related to the crime and went to his credibility. Because the court would have permitted the questions, it was not ineffective for counsel to fail to object.

Mr. Morrison claims counsel was also ineffective by informing the court and prosecutor during sidebar that the officers had not testified Mr. Morrison had been given his *Miranda* warnings. Whether he received *Miranda* warnings is an issue for the judge in a CrR 3.5/3.6 hearing, not a jury issue. This does not provide a basis for an ineffective assistance of counsel claim.

Mr. Morrison finally asserts counsel was ineffective for failing to object to portions of the prosecutor's closing argument. But the prosecutor did not commit misconduct during closing. Thus, there was no basis for an objection.

Mr. Morrison argues the evidence was insufficient to support his conviction of attempting to manufacture methamphetamine. We view the evidence in the

light most favorable to the State, finding it sufficient if it would permit any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *Hendrickson*, 129 Wn. 2d at 81. "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. *State v. Galisia*, 63 Wn. App. 833, 838, 822 P.2d 303, *review denied*, 119 Wn.2d 1003 (1992).

Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn. 2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

Criminal attempt is an act that is a substantial step toward the commission of an intended crime. RCW 9A.28.020(1). Items commonly used in the process of manufacturing methamphetamine were present – anhydrous ammonia, a generator, propane tanks, coffee filters, batteries, and tubing. The lab tests, however, showed no residue on the coffee filters and salt tested negative for use

in the manufacturing process. Only one of the propane tanks appeared to contain anhydrous ammonia, and it was found some distance from the campsite.

We defer to the trier of fact as to the persuasiveness of the evidence. When the State's evidence is accepted as true, there was substantial evidence from which the jury could find his guilt.

Mr. Morrison has also filed additional grounds for review. He first claims the State failed to prove the anhydrous ammonia was in liquid form, which is required to manufacture methamphetamine. Anhydrous ammonia, however, is the liquid form of ammonia. This is not a basis for reversal.

Mr. Morrison also contends the evidence was insufficient to support his conviction for attempted manufacture of methamphetamine. The arguments he makes have been made by appellate counsel and already rejected.

Finally, Mr. Morrison asserts the officers lacked any authority to enter the campground. He bases his argument on the fact the campground was private property and he had permission to be there.

The campground was owned by American Forest Resource. A forester testified Mr. Morrison had been asked to leave. He did not have permission to be there.

The police also had a right to intrude. If there is some implied public

access to private property, a police officer without a warrant has the right to intrude. *State v. Littlefair*, 129 Wn. App. 330, 344, 119 P.3d 359 (2005). The property was a campground. At the time of this incident, there was a sign indicating the campground was closed. The police received a call that suspicious vehicles were in the campground. There was an implied public access permitting the officers to intrude.

Furthermore, Fourth Amendment rights are personal rights that may not be vicariously asserted. *State v. Goucher*, 124 Wn.2d 778, 787, 881 P.2d 210 (1994). "A defendant may challenge a search or seizure only if he . . . has a personal Fourth Amendment privacy interest in the area searched or the property seized." *Id*. "Presence alone is not sufficient." *State v. Boot*, 81 Wn. App. 546, 551, 915 P.2d 592 (1996) (citing *State v. Jones*, 68 Wn. App. 843, 849, 845 P.2d 1358, *review denied*, 122 Wn.2d 1018 (1993)).

Mr. Morrison does not claim to own the property searched. Therefore, he lacks standing to challenge the search unless he is entitled to assert automatic standing. "A person may rely on the automatic standing doctrine only if the challenged police action produced the evidence sought to be used against him." *State v. Jones*, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002) (citing *State v. Williams*, 142 Wn.2d 17, 23, 11 P.3d 714 (2000)). "To assert automatic standing,

a defendant (1) must be charged with an offense that involves possession as an essential element; and (2) must be in possession of the subject matter at the time of the search or seizure." *Id.* (citing *State v. Simpson*, 95 Wn.2d 170, 181, 622 P.2d 1199 (1980).

Mr. Morrison would have automatic standing to challenge the possession charge. But he was not lawfully arrested. The possession charge must therefore be reversed. As for the attempted manufacturing charge, possession is not an element. Thus, he cannot challenge the search on that charge.

We affirm his conviction for attempted manufacture of methamphetamine, but reverse his conviction for possession of methamphetamine.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

_____
Kato, J.

WE CONCUR:

_____
Brown, J.

_____
Kulik, J.